

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MARYLAND

3
4 UNITED STATES OF AMERICA

5 VS.

CRIMINAL NO. CCB-08-0091

6 BALRAJ NAIDU

7 DEFENDANT

8 Baltimore, Maryland

9 July 9, 2010

10
11 The above-entitled case came on for a motions
12 hearing before the Honorable Catherine C. Blake,
13 United States District Judge

14
15 A P P E A R A N C E S

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18 For the Government:

19 James G. Warwick, Esquire

20
21 For the Defendant:

22 William B. Purpura, Jr., Esquire

23
24
25 Gail A. Simpkins, RPR
Official Court Reporter

P R O C E E D I N G S

MR. WARWICK: May I call the case, Your Honor?

THE COURT: Sure.

MR. WARWICK: Your Honor, this is the matter of the United States of America versus Balraj Naidu. The Criminal Number is CCB-08-091. The matter is before the Court this morning for a hearing on the defense motion to dismiss Counts 2 and 6 of the indictment.

THE COURT: All right. Thank you.

Good morning.

MR. PURPURA: Your Honor, good morning, William Purpura on behalf of Balraj Naidu. Mr. Naidu is present.

THE DEFENDANT: Good morning.

MR. PURPURA: Your Honor, also listed I believe for this morning was a motion to suppress custodial statements. That motion is obviously a very brief motion. It's prophylactic in nature. We're not sure if there is going to an issue. Rather than bring witnesses from Singapore today, with the Court's permission, we will hold that off until and if there is a trial in October.

THE COURT: Okay. That makes sense to me.

MR. PURPURA: This is just oral argument. It shouldn't be too lengthy. Since it is my motion, does

1 the Court want to hear from me briefly?

2 THE COURT: I think that's probably a good idea.
3 Now my understanding is that Counts 2 and 6 are the
4 only ones here. Those are the only ones that your
5 client was extradited on.

6 MR. PURPURA: That is correct.

7 MR. WARWICK: That is correct.

8 THE COURT: Count 2 being the conspiracy to
9 provide material support and resources, and Count 6
10 being possession of firearms.

11 I did read the motions obviously. Obviously
12 you're not contesting that Congress has said that
13 2339B should have extraterritorial application, but
14 you don't think that your client fits into C or D or E
15 as a matter of due process essentially?

16 MR. PURPURA: That is correct. Actually, I
17 think we labeled that as -- one second, please, C, D
18 and E.

19 Actually, in the motion, in our papers we said
20 D, E and F, but it should be C, D and E, as the Court
21 just indicated.

22 That is correct. We said, and we argued that he
23 should not fit into that as well. We argued that.

24 Did the Court want to go through anything
25 further?

1 THE COURT: No. You go ahead.

2 MR. PURPURA: Judge, for all the argument that
3 we set forth, and a lot of the due process argument,
4 perhaps it would be better raised as a Rule 29, when
5 the evidence is before the Court. So at this point
6 here, for the purpose of this motion, all the facts
7 asserted in the indictment we must consider as proven.

8 In addition, we have no objection -- I'm not
9 sure if the government submitted the affidavit by the
10 case agent, but I will make that an exhibit motion,
11 and we will assume for the purpose of this argument
12 here that all the facts in that are accurate as well,
13 which gives the Court a better factual background to
14 work with.

15 THE COURT: All right. That would be helpful.
16 I don't think anyone has given me --

17 MR. WARWICK: If I may ask, is that the
18 extradition affidavit?

19 MR. PURPURA: Yes, it is.

20 MR. WARWICK: Your Honor, the response filed by
21 the United States is just utilizing the allegations
22 contained in the indictment, and that's because of the
23 standard of a motion to dismiss.

24 But we can certainly -- I have no objection to
25 the extradition affidavit by Agent Burgess being part

1 of the record.

2 MR. PURPURA: Thank you. We will offer this as
3 a joint exhibit for the purposes of the motion.

4 If I could approach?

5 THE COURT: Okay.

6 MR. PURPURA: It is the Affidavit in Support of
7 Request for Extradition of Balraj Naidu. It is by
8 Agent John Burgess.

9 THE COURT: Thank you.

10 (Joint Motion Exhibit Number 1 was received.)

11 MR. PURPURA: Just to briefly outline the facts
12 as they are set forth in the affidavit, as well as the
13 indictment itself, the starting person would be, at
14 least in my estimation, a Mr. Santhirajah, and he is
15 the person who is still pending extradition from
16 Australia. He allegedly, according to the indictment
17 and the affidavit, is attempting to obtain weapons for
18 LTTE, the Tamil Tigers from Sri Lanka.

19 His first contact in the indictment is a Haniffa
20 Bin Osman, who the Court is familiar with, who has
21 pled guilty in this court before. As Bin Osman
22 indicated in his guilty plea, as well as in the
23 affidavit the Court has before it, he was contacted by
24 Mr. Santhirajah first to obtain materials for his
25 hotel, such as cleaning materials, because he had a

1 cleaning business. From cleaning materials, Bin Osman
2 was asked if he could get computers, and he obtained
3 computers, and from computers, he was then asked if he
4 could obtain weapons for the Tamil Tigers, and he said
5 I'll see what I can do.

6 He then, and we're not really sure how the
7 contact occurs, but sometime in 2006, he has contact
8 with Balraj Naidu, who is present here. There is a
9 meeting February 9th of 2006 allegedly in Malaysia
10 between the parties, and the discussion is we're going
11 to obtain weapons for LTTE at that time.

12 From that point, February 9, 2006, there is a
13 series of attempts by Mr. Naidu, according to the
14 indictment, as well as the affidavit, to obtain these
15 weapons. His contact is with China, Hong Kong, and
16 Indonesia. It is not with the United States.

17 He is fruitless, Mr. Naidu, in his attempts to
18 obtain weapons, to act as a middle for these attempts
19 for weapons.

20 Then sometime in April of 2006, Mr. Haniffa Bin
21 Osman becomes somewhat frustrated, we can only assume,
22 and he seeks the services of someone else, and that
23 someone else is Haji Subandi, S U B A N D I. We know
24 that because on April 27th of 2006, Mr. Subandi then
25 makes the first e-mail attempt, which is listed in the

1 affidavit, to the United States.

2 The contact in the United States is an
3 undercover federal agency, and it is operated by a --
4 the name given at that time is David Austin. What's
5 important to note is that David Austin had contact
6 with Mr. Subandi all the way back to March of 2004.
7 So there has been contact from the United States with
8 Subandi which precedes this, nothing to do with Naidu
9 whatsoever. Naidu is fruitless in anything he
10 attempted to do.

11 What then continues is a lengthy series of
12 e-mails between, mainly between Subandi and the United
13 States contact in an attempt to negotiate for these
14 arms, and that's finally culminated September 28,
15 2006, when there's a wire transfer, and September 29th
16 of 2006, when there are arrests of various gentlemen
17 in Guam.

18 Now what's important to note is that Naidu
19 doesn't come to the United States, is really, although
20 he is mentioned in these e-mails, there is nothing of
21 substance that has his involvement in any of these
22 transactions during this period of time. At best, at
23 best, he is a tagalong during this period of time,
24 with the hope that he is going to get some sort of
25 commission if this deal is consummated eventually, and

1 that's why he's there.

2 THE COURT: The allegation in the indictment is
3 that on July 24th, he drove Mr. Bin Osman to the
4 airport in Singapore for a flight to the U.S. --

5 MR. PURPURA: He does.

6 THE COURT: -- knowing that Bin Osman was going,
7 and allegedly staying in touch with the negotiations
8 by text message into the United States.

9 MR. PURPURA: I see that in the indictment, and
10 I don't doubt, since we did speak to Mr. Bin Osman,
11 that he will testify to that, and that will be a fact.

12 Again, there's nothing -- again, he drives him
13 to the airport, but again, there's nothing of
14 substance that he does. He acts as a cab at that
15 point. He's not negotiating. He's not doing anything
16 as far as to facilitate the contact with the United
17 States, except staying in contact for what he hopes to
18 be some money for the work that he did with his
19 contact with China, Hong Kong and Indonesia, his very
20 unsuccessful contact. All the time he remains in
21 Singapore during this period of time here, without any
22 travel to the United States.

23 That's basically the factual background. I
24 understand what we have. What we are suggesting,
25 number one, on the due process issue, why the

1 extraterritorial jurisdiction should not apply in this
2 case, we suggest that it is tainted by the conduct of
3 the United States and the agents.

4 Here, the only way the United States gets
5 brought in is because of the prior March 2004 contact
6 with this David Austin, the undercover agent for the
7 United States, and Haji Subandi.

8 THE COURT: But I guess I don't see how that
9 taints it. I mean what's the difference between this
10 and sort of an ordinary sting operation, the
11 government saying hi, we're here to sell you something
12 illegal, would you like to buy something, and people,
13 Mr. Subandi says okay, I'll take advantage of that?

14 MR. PURPURA: You know, at this point, based on
15 the face of the indictment, what we have here, I
16 understand the Court's rationale on that completely.
17 I'm not sure of the context between the relationship
18 or how that relationship became between the United
19 States and Mr. Subandi. I'm not sure of that. That
20 may be an issue, and that may or may not be fleshed
21 out during the trial. But I completely understand the
22 Court's position on that. I'm not sure of the scope
23 of the relationship or how Subandi became to deal with
24 the United States.

25 But I guess the simple point on this, as well as

1 the second part of the argument, which is even if
2 jurisdiction is granted, the conduct of Mr. Naidu is
3 so minimal that it would be difficult for him to
4 reasonably anticipate being haled into a court in the
5 United States based on the conduct of others.

6 THE COURT: But again, just going on the
7 indictment, if he is allegedly part of a conspiracy
8 that knows that it is attempting to purchase weapons
9 from the United States, isn't that enough?

10 I mean a lot of the cases deal the other way
11 because it is drugs being imported into the United
12 States, something coming in, and that's clearly
13 enough.

14 I guess I'm not sure why if the object is to get
15 a whole bunch of weapons from a whole bunch of U.S.
16 manufacturers, which is what's in the indictment, and
17 ship it someplace, why you wouldn't think you might be
18 doing business with the United States, sufficiently to
19 be haled into that jurisdiction.

20 MR. PURPURA: I understand the Court's argument,
21 and we presented it based on the indictment. So
22 whether the evidence will be any different at the time
23 of trial, I don't know. But in essence, that would be
24 the argument on that issue itself.

25 THE COURT: Yeah. Now tell me about the 924(c).

1 MR. PURPURA: That, hopefully, I think that was
2 the argument that I think is of particular interest
3 here. I think it's a completely different argument
4 than what we just presented here. This argument was
5 presented to preserve whatever record we could
6 possibly have, and we have done that in this case.

7 THE COURT: Sure.

8 MR. PURPURA: When we first looked at the
9 indictment, without doing any research, and there's
10 very limited research on this issue, it just seemed to
11 me from the basic reading of the enhancement
12 provision -- we know what 924(c) is -- it seems that
13 Congress intended it as a punishment in addition to
14 the crime itself, because you have enhanced the crime
15 when you are using a weapon in furtherance of the
16 crime. Logically, that just makes sense.

17 The simple example is in a bank robbery, you go
18 in and you commit a bank robbery and it's a particular
19 crime. You commit a bank robbery with a gun, and it
20 is enhanced under 924(c). If you rob a second bank,
21 the penalties increase there from five, the mandatory
22 minimum, to 25, and etcetera.

23 That just makes sense because you are taking the
24 substantive crime and you are enhancing it. You are
25 enhancing the danger of the crime itself because

1 you're adding the element of the weapon.

2 The same thing with a narcotics transaction.
3 You can have a conspiracy, as in here, a conspiracy to
4 distribute narcotics. What enhances the danger of the
5 conspiracy to distribute the narcotics is the use of
6 the gun and I think, which is the key, especially in
7 the narcotics realm is in furtherance of.

8 As the Court in Bailey indicated, furtherance is
9 a very important element. It's not just the
10 possession of it. It has got to be in furtherance of
11 it.

12 So if you set aside multiplicitous, and I
13 incorrectly said duplicitous, which I agree, and you
14 really look at the plain language of 924(c), it
15 simply, it simply means that it has to embolden, or it
16 is there to protect the people who are committing the
17 crime. It must be in furtherance, and it has to
18 enhance the crime itself.

19 I don't see it here. What this crime here is,
20 and it is obviously a very serious crime, but the
21 crime here is the supplying material support. What
22 the material support is in this particular case is
23 weapons that at this level, in the indictment and in
24 the affidavit, and anything so far that has been
25 disclosed, there is nothing at all to indicate that

1 the crime was enhanced by using a weapon in
2 furtherance of that conspiracy, which is --

3 THE COURT: Or possessing, or possessing.

4 MR. PURPURA: Right.

5 THE COURT: We're not talking using, right? We
6 are talking about possession in terms of six.

7 MR. PURPURA: Possession in furtherance.

8 THE COURT: The factual underlying part of this,
9 also I want to make sure I understand, the date
10 alleged is September 26th of 2006. So my
11 understanding is that's when certain people meet in
12 Guam --

13 MR. PURPURA: Correct.

14 THE COURT: -- to look at weapons which might be
15 purchased.

16 MR. PURPURA: Actually, you don't have this
17 information before you now, but I have no problem
18 fleshing this out, because it's important.

19 You can assume for the purpose of this hearing
20 that when Bin Osman came to the United States, he
21 tested weapons. He actually possessed the weapon. He
22 tested the weapon, and weapons were actually tested
23 and possessed by him at that time. That was sometime
24 I believe in April of 2006.

25 THE COURT: But Count 6 --

1 MR. PURPURA: Summer of 2006. Excuse me.

2 THE COURT: I'm sorry. Count 6 only relates to
3 the September 26th transaction as far as I can see.

4 MR. PURPURA: Let me take a quick look.

5 MR. WARWICK: That is correct, Your Honor.

6 THE COURT: I don't see Mr. -- let's just
7 interrupt for a minute.

8 What is the theory of Mr. Naidu's possessing
9 firearms on September 26th?

10 MR. WARWICK: It's a Pinkerton application, Your
11 Honor, because the conspiracy to provide material
12 support for the terrorist organization is the
13 underlying crime of violence. The case law is clear
14 that a conspiracy can support a 924(c) charge.

15 THE COURT: Well, a conspiracy can be the
16 underlying crime of violence.

17 MR. WARWICK: It is. On that particular date in
18 September of 2006, there was a meeting in Guam, and
19 that was different from the test-firing of the weapons
20 in Maryland.

21 THE COURT: Right.

22 MR. WARWICK: Test-firing of the weapons is part
23 of the negotiation process. After the weapons were
24 tested, and reports made back to the Tamil
25 representatives, then the purchase authorizations were

1 approved. In August of 2006, there was a first wire
2 transfer of over 400,000.

3 Then in Guam, after the weapons were physically
4 present in Guam, they were inspected. They were
5 broken down by Mr. Varatharasa and others. Mr. Naidu
6 was still part of the conspiracy. He still stood to
7 physically, I'm sorry, to financially profit from the
8 arms deal, because he was to share a commission with
9 Mr. Bin Osman and with others for setting up this
10 deal.

11 THE COURT: So you are saying Mr. Naidu would be
12 liable under the Pinkerton theory --

13 MR. WARWICK: That is correct.

14 THE COURT: -- for Mr. Varatharasa's inspection
15 of the guns?

16 MR. WARWICK: Right. There were a number of
17 co-conspirators on Guam at that time. Inspecting the
18 weapons were Bin Osman and Varatharasa.

19 Varatharasa, that was his specialty. He was
20 sent specifically by the Tamil Tigers for the purpose
21 of inspecting the weapons. He broke the weapons down.
22 It's all on videotape. He inspected the weapons, made
23 certain complaints concerning aspects of the weaponry
24 as not being completely new as ordered. They had been
25 refurbished, things like that.

1 THE COURT: Those weapons were the -- well, I
2 guess a couple things.

3 In terms of possession, you would be relying on
4 through Pinkerton.

5 MR. WARWICK: That's correct.

6 THE COURT: -- the actual physical possession,
7 the fact that Mr. Bin Osman had his hands on the
8 weapons?

9 MR. WARWICK: Yes.

10 THE COURT: They were not taken into, other than
11 that, I mean they were not taken into the dominion and
12 control of the conspiracy, right?

13 MR. WARWICK: They were in a warehouse and where
14 they were handled, inspected. The second part of the
15 payment was wired, and at that point the guns, as per
16 the intent of the co-conspirators, were to be loaded,
17 transferred from the warehouse to a ship that ICE had
18 arranged as kind of a sham or a screen to create the
19 illusion that there would actually be a transfer.

20 Then when the last co-conspirator arrived on
21 Guam, and that would have been Mr. Wotulo -- the Court
22 may recall, he was the one who had calculated the
23 route through Indonesian waters, and he was also again
24 part of the conspiracy in the acquisition process.

25 Once he came in, the weapons were to be loaded

1 that day or transferred to the ship, but everyone was
2 arrested.

3 So the possessory aspect was that they were
4 going through all the weapons, and they were testing
5 the weapons for their efficacy.

6 THE COURT: Okay. Thank you.

7 MR. PURPURA: Judge, I did not raise the
8 possessory issue, but the Court has on its own, and I
9 think it's an important issue here.

10 As we fleshed out the facts a little more, the
11 weapons actually never become in the dominion and
12 control of any of the co-conspirators. At best, they
13 are being monitored by government agents as they take
14 a look at the weapons and see if they are workable.
15 But that's on the possessory issue as well, the
16 argument which I posed, and I think that's a very good
17 argument.

18 THE COURT: You've got a separate argument,
19 right, the furtherance.

20 MR. PURPURA: Exactly. Whether you possess or
21 use, it's not in furtherance. It is the conspiracy
22 itself, the weapons here.

23 Obviously you can, if it's a conspiracy to
24 interdict an arms shipment within the United States,
25 and you use a weapon to embolden or enhance or just

1 possess a weapon to embolden or enhance that
2 conspiracy, then the 924(c) would be applicable, and
3 that's clearly the intent of Congress itself.

4 But if no weapon is used, because the shipment
5 is guns, I don't believe again that the 924(c)
6 applies, because it doesn't enhance, embolden. It's
7 not used or possessed to further the conspiracy.

8 As I pointed out as well, in the statute itself,
9 it really doesn't seem to make sense. That 2339B,
10 some of the substances which are outlined obviously
11 are weapons, but also lethal substances, lethal gases
12 and explosives, and there's no punishment in 924(c).
13 There's no enhancement for those.

14 The enhancement in the statute itself in 2339B
15 is that if death occurs, it can be any period of
16 incarceration increased from 15 up to life itself.

17 So under the plain reading of 924(c), in
18 combination of 18 U.S.C. 2339B, the application of the
19 enhancement just should not apply, in addition to the
20 Court's argument or the Court's issue which was
21 raised, as far as actual possession on the date
22 charged in the indictment, that it was not possession
23 in the true sense because it was never dominion and
24 control. It was at best just to look at the guns
25 itself to inspect them. There was no transfer of

1 dominion and control to any of the co-defendants in
2 this particular case.

3 THE COURT: Okay.

4 MR. PURPURA: Thank you.

5 THE COURT: Thank you.

6 MR. WARWICK: Your Honor, briefly, as far as the
7 924 issue, the possession need only be to further,
8 advance or help forward a crime of violence, and the
9 physical inspection, the breaking down of the
10 components of these weapons, even though in the
11 presence of the agents, certainly constituted
12 possession in furtherance, because it did advance the
13 purchase and the purpose of the conspiracy.

14 THE COURT: I don't see how you distinguish
15 between the possession of the weapons as just the
16 ultimate goal of the conspiracy and the in furtherance
17 part.

18 When I think of a 924(c), here's conspiracy
19 number one, and it has got its objective, which the
20 common one is to rob the store, and you are possessing
21 a firearm here in furtherance of it, or you're dealing
22 drugs out of your apartment and your gun is sitting
23 over here. So the possession of the gun furthers it
24 because it emboldens you or protects the drugs or what
25 have you.

1 Here, it just seems to me it's the same thing.
2 I am having trouble understanding the distinction
3 between providing material support, i.e., firearms,
4 and possessing the firearms.

5 MR. WARWICK: Well, the possession of the
6 firearms were by Bin Osman and Varatharasa on behalf
7 of the conspiracy. They inspected them.

8 The key test is not whether or not the
9 government agents were present, and the key is not
10 whether or not the guns were ever going to be allowed
11 to be loaded on that ship and transferred to Sri
12 Lanka.

13 THE COURT: Right.

14 MR. WARWICK: The key aspect is the state of
15 mind of the co-conspirators and whether, as a factual
16 basis, their possession of these firearms, even though
17 temporary, advanced or forwarded, or was in
18 furtherance of the intended transfer of these weapons
19 to the LTTE. I think the facts will show that it was
20 the case that their state of mind, they were there to
21 inspect --

22 THE COURT: Are you saying that any 2339B that
23 involves weapons automatically includes a 924(c)?

24 MR. WARWICK: That is correct. As long as the
25 weapons were at sometime possessed or used, that would

1 qualify.

2 THE COURT: Well, they are going to have to be
3 possessed.

4 MR. WARWICK: Oh, no.

5 THE COURT: It's going to be an object at least.
6 The object would be to possess them.

7 MR. WARWICK: They don't necessarily have to be
8 possessed. For instance, there have been cases where
9 the agreements or the conspiratorial crime itself has
10 involved attempts to purchase surface-to-air-missiles
11 for a third party country, and there have been money
12 transfers and other exchange of weapon, specific
13 information. That would constitute the conspiracy.
14 But because there wasn't any actual transfer, whether
15 temporary or permanent transfer of the weaponry, you
16 would have only the conspiracy and not the 924(c).

17 But because this is different, because there was
18 a temporary possession of these weapons by Bin Osman
19 and Varatharasa, I think under the standards of the
20 motion to dismiss, it does on its face state a crime.

21 THE COURT: I mean there may be an issue about
22 procedurally where we are, comparing the language of
23 the indictment to what I think the facts are. You
24 sort of alluded to this at the beginning. I mean I
25 may have a Rule 29 issue.

1 MR. WARWICK: Candidly, Your Honor, Mr.
2 Purpura's argument is more appropriate in terms of a
3 Rule 29 application than it is to a motion to dismiss,
4 because the standard is certainly different. I do
5 expect that the evidence will establish through the
6 witnesses the specific reason for the possession of
7 the weapons, albeit temporary, but it would constitute
8 that crime.

9 MR. PURPURA: Judge, if I may. Assume that
10 there was possession just for this, and I don't
11 believe there was, but assume for this purpose there
12 was possession. Still, I think the key of the other
13 key argument which I'm making is, and that the Court
14 obviously picked up on, is it is not in furtherance of
15 the conspiracy. It is part of the conspiracy itself.

16 If the government has any factual allegation now
17 that they can present, then I'll concede that I will
18 deem it was proven for part of this motion if at any
19 time a weapon was used, and the common intent of
20 924(c) that Congress intended, to further the object
21 of the conspiracy itself, and not being the object of
22 the conspiracy, which was the possession.

23 THE COURT: As I understand his argument at the
24 moment, it is that even though this would presumably
25 still be sort of an overt act in the conspiracy, isn't

1 it, even though it's an overt act, certainly it's an
2 action taken in furtherance of the conspiracy. You've
3 got to test your weapons.

4 That the fact of doing that, physically
5 possessing the weapons and testing them is in
6 furtherance of the ultimate aim of getting these same
7 weapons into the hands of the foreign terrorists.

8 Simply looking at the indictment, and again, I'm
9 coming back to my procedural problem, it could be that
10 the facts supported something that you and I might
11 agree was in furtherance. If they went to inspect the
12 weapons that were the object of the conspiracy, and
13 they brought with them their machine gun to protect
14 themselves, that's a different situation.

15 MR. PURPURA: We agree. That seems to be --

16 THE COURT: If all I have in front of me is the
17 indictment, we come back to this. I don't know. We
18 at least have, we certainly have -- what I understand
19 to be the factual proffer from the government is what
20 they've just made and perhaps what's in this
21 affidavit.

22 MR. WARWICK: That is correct, Your Honor. As I
23 said, what I said by way of proffer as far as the
24 state of mind of Mr. Varatharasa and Mr. Bin Osman,
25 when they inspected those weapons, the government

1 contends that that is the possession in furtherance.
2 Even though it was temporary possession, it was
3 certainly an overt act in furtherance of the
4 conspiracy, but it also constitutes a separate crime.
5 It is certainly not a multiplicitous crime because it
6 has different elements than the conspiracy count set
7 forth in Count 2.

8 THE COURT: This is an interesting question.

9 MR. PURPURA: It's also a very important
10 question because the enhancement here is 30 years
11 consecutive time if in fact it was machine guns, which
12 I believe they probably can use, on top of the 15
13 years. So it's a life sentence versus a sentence
14 under the Guidelines even if he goes to trial and is
15 found guilty, which could be in the five to seven year
16 range. So it's a very important question.

17 That's why the 924(c) enhancement is used to
18 punish those who merely use those weapons to further
19 the object. That's why it really doesn't makes sense.
20 If Congress intended that, they would have put that in
21 this particular statute, and they didn't.

22 Counsel, Mr. Warwick mentioned the
23 surface-to-air-missile. That wouldn't be a 924(c).
24 The surface-to-air-missiles, there would be no
25 enhancement. That just doesn't make sense.

1 If they would have bought lethal gas, which
2 could destroy an entire country, there would be no
3 enhancement, even if they picked it up and test it
4 chemically.

5 You never use the rule of lenity, and here, you
6 probably should use the rule of lenity because if
7 you're going to construe the statute, it should be
8 construed favorably to the defendant. 924(c) is just
9 not designed for this type of offense, and there's no
10 case law. There's nothing on it.

11 THE COURT: No. I was hoping you all might have
12 given me more than what seems to be out there.

13 MR. WARWICK: Your Honor, I can certainly go
14 back and see what else is out there, but I disagree
15 with what Mr. Purpura has just said.

16 The penalties involved here certainly are stiff.
17 But if we are talking equities, we're also talking
18 almost a million dollars worth of sophisticated
19 weaponry that were intended to kill many, many other
20 people.

21 But one of the things I brought to Mr. Purpura's
22 attention, and I would like to bring to the Court's
23 attention, is that in May of this year, the Supreme
24 Court decided the matter of U.S. versus O'Brien.
25 Essentially the Supreme Court resolved a split among

1 the Circuits concerning the enhancements under 924(c),
2 specifically the machine gun enhancement.

3 Certainly under the holding of that case,
4 whether or not a machine gun is involved is not a
5 question to be resolved by the Court at sentencing.
6 It's a jury question.

7 I'm awaiting guidance from the Department as to
8 whether or not, in the Department's assessment of
9 O'Brien, that fact has to be pleaded in the indictment
10 as well. If it does have to be pleaded, then I will
11 certainly advise Mr. Purpura of that, and I will
12 certainly also undertake discussions with the
13 Department as far as the appropriateness of it as
14 well.

15 But penalties in my view don't justify a
16 different interpretation of the statute or the law.
17 It's whether or not the elements are there on its face
18 at this point, and subject to Rule 29 constraints,
19 whether the government has proven those elements.

20 THE COURT: Okay. I need to think about all of
21 this a little bit longer, and I need to take short
22 recess.

23 Actually, if you all couple just hang out a
24 little bit and come back into chambers in about ten
25 minutes?

1 MR. WARWICK: Very good, Your Honor.

2 MR. PURPURA: Certainly.

3 THE COURT: Thank you.

4 (The proceedings concluded.)

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JOINT MOTION EXHIBIT 1 5

REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of United States of America vs. Balraj Naidu, Defendant, Criminal Action No. CCB-08-0091, before the Honorable Catherine C. Blake, United States District Judge, on July 9, 2010 is true and accurate.

Gail A. Simpkins

Official Court Reporter

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